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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 DAVID HARRERA-ROMAN,

11 Plaintiff,

12 vs.  
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14  
15 JOHN HARRIS, et al.,

16 Defendants.  
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CASE NO. 11cv840-MMA (KSC)

**ORDER DENYING DEFENDANTS'  
MOTION TO DISMISS WITHOUT  
PREJUDICE;**

[Doc. No. 54]

**DIRECTING U.S. MARSHAL TO  
EFFECT SERVICE OF SECOND  
AMENDED COMPLAINT  
PURSUANT TO Fed.R.Civ.P. 4(c)(3)  
& 28 U.S.C. § 1915(d)**

18 Defendants United States Border Patrol Agents John Harris, Jon P. Rauterkus,  
19 Justin W. Gloyer (erroneously identified as Justin W. Glover), and Charles C. Loy  
20 (erroneously identified as Charles C. Coy) (collectively “Defendants”) move to  
21 dismiss this action pursuant to Federal Rules of Civil Procedure 12(b)(2) and  
22 12(b)(5) for lack of personal jurisdiction and insufficient service of process. *See*  
23 Doc. No. 54. Plaintiff David Herrera-Roman (“Plaintiff”) failed to file a timely  
24 response and the Court took the matter under submission without a hearing in  
25 accordance with Civil Local Rule 7.1.d.1. *See* Doc. No. 55. Thereafter, Plaintiff  
26 filed a “Request for Judicial Notice,” in which he asserts that he did not file a  
27 response to the pending motion to dismiss because he was not served with the  
28 motion. *See* Doc. No. 56. For the reasons set forth below, the Court **DENIES**

1 Defendants' motion without prejudice and **DIRECTS** the United States Marshal to  
 2 effect service of Plaintiff's Second Amended Complaint.

### 3 PROCEDURAL BACKGROUND

4 On April 20, 2011, Plaintiff, an inmate currently incarcerated at the United  
 5 States Penitentiary in Tucson, Arizona, and proceeding *pro se* and *in forma*  
 6 *pauperis*, filed a civil rights complaint pursuant to 42 U.S.C. § 1983. *See* Doc. No.  
 7 1. The Court liberally construed Plaintiff's complaint as being brought pursuant to  
 8 *Bivens v. Six Unknown Named Fed. Narcotics Agents*, 403 U.S. 388 (1971). *See*  
 9 Doc. No. 9. On August 8, 2011, Plaintiff filed a First Amended Complaint ("FAC").  
 10 *See* Doc. No. 10. The Court found Plaintiff's claims sufficiently pleaded to survive  
 11 the *sua sponte* screening required by 28 U.S.C. §§ 1915(e)(2), 1915A(b), and  
 12 directed the United States Marshal to effect service of the FAC. *See* Doc. Nos. 12,  
 13 17.

14 On May 7, 2012, Plaintiff filed a motion to amend his complaint and a request  
 15 for a status update. *See* Doc. No. 29. On June 18, 2012, Defendants filed a response  
 16 to Plaintiff's motion, which included a request to dismiss Plaintiff's FAC pursuant to  
 17 Federal Rule of Civil Procedure 4(m) for improper service. *See* Doc. No. 32. On  
 18 December 28, 2012, Plaintiff filed a Second Amended Complaint ("SAC").<sup>1</sup>  
 19 *See* Doc. No. 46. On March 11, 2013, the Court ordered Defendants to answer or  
 20 otherwise respond to Plaintiff's SAC. *See* Doc. No. 51. Defendants now move to  
 21 dismiss the SAC. *See* Doc. No. 54. Defendants argue that Plaintiff never properly  
 22 served the FAC and has not attempted service of the SAC. As such, Defendants  
 23 argue that the Court lacks personal jurisdiction over them and the action should be  
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25 <sup>1</sup> A discrepancy order was issued, noting that Plaintiff did not have leave to  
 26 amend and referencing the pending motion for leave to amend. *See* Doc. No. 45.  
 27 However, the SAC was accepted for filing. *Id.* In other words, the SAC was filed with  
 28 leave of court, as permitted by Federal Rule of Civil Procedure 15(a)(2). As this Court  
 noted in its March 11, 2013 Order, once a newly amended complaint is filed, it  
 supersedes the previously filed complaint and becomes the operative pleading.  
*See* Doc. No. 51, citing *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1474 (9th Cir. 1997).

1 dismissed.

## 2 DISCUSSION

3 Because Plaintiff is proceeding *in forma pauperis* in this case, as noted above,  
4 he is entitled to have service effected by the United States Marshal with respect to  
5 the SAC. *See* Fed. R. Civ. P. 4(c)(2). However, it appears that a summons did not  
6 issue on the SAC, nor did Plaintiff receive an “IFP Package” after the SAC was  
7 filed. As such, Plaintiff, who is an incarcerated individual, has had no means by  
8 which to serve Defendants with the SAC.

9 Defendants are correct that Plaintiff’s time for serving the SAC expired on  
10 April 29, 2013. *See* Fed. R. Civ. P. 4(m) (service within 120 days after complaint is  
11 filed). However, where a delay in service is attributable to the court clerk, such as is  
12 the case here, such delay constitutes “good cause” to avoid dismissal. *Puett v.*  
13 *Blandford*, 912 F.2d 270, 273 (9th Cir. 1990) (“[P]laintiff should not be penalized by  
14 having his or her action dismissed for failure to effect service where the U.S.  
15 Marshal or the court clerk has failed to perform the duties required of each of them  
16 under 28 U.S.C. § 1915(c) and Rule 4 of the Federal Rules of Civil Procedure.”); *see*  
17 *also, Walker v. Sumner*, 14 F.3d 1415, 1422 (9th Cir. 1994). “The duty of the court  
18 to direct service and the duty of the appointed server to accomplish service through  
19 reasonable efforts is not discretionary. In cases like this, then, service is inevitable .  
20 . . The only question is how long that service will take and how much it will cost.”  
21 *Lieberman v. Walker*, 2007 U.S. Dist. LEXIS 4059, 1-2 (C.D. Ill. 2007).

22 Accordingly, dismissal of this action is not appropriate and Plaintiff is entitled  
23 to rely on the United States Marshal to effect personal service of the SAC upon  
24 Defendants. *See Puett*, 912 F.2d at 275.

## 25 CONCLUSION

26 Based on the foregoing, the Court **DENIES** Defendants’ motion to dismiss  
27 without prejudice. The Court hereby **INSTRUCTS** the United States Attorney’s  
28 Office to provide the United States Marshal, in a confidential memorandum, with the

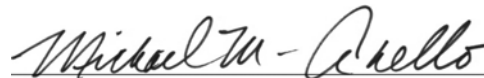
1 information necessary to personally serve Defendants.

2 Following the receipt of any available information for Defendants, the Court  
 3 **DIRECTS** the United States Marshal to serve a copy of Plaintiff's Second Amended  
 4 Complaint and summons upon Defendants pursuant to Federal Rule of Civil  
 5 Procedure 4(i)(3).<sup>2</sup> Defendants' addresses should not appear on the U.S. Marshal  
 6 Form 285s.

7 The Court further **DIRECTS** the United States Marshal to serve the United  
 8 States pursuant to Federal Rule of Civil Procedure 4(i)(1).<sup>3</sup> All costs of service shall  
 9 be advanced by the United States pursuant to the Court's Orders granting Plaintiff  
 10 leave to proceed *in forma pauperis* and directing service pursuant to 28 U.S.C. §  
 11 1915(d) and Fed.R.Civ.P. 4(c)(3). See Doc. Nos. 9, 12.

12 **IT IS SO ORDERED.**

13 DATED: May 22, 2013



Hon. Michael M. Anello  
 United States District Judge

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 23 <sup>2</sup> "To serve a United States officer or employee sued in an individual capacity  
 24 for an act or omission occurring in connection with duties performed on the United  
 25 States' behalf (whether or not the officer or employee is also sued in an official  
 capacity), a party must serve the United States and also serve the officer or employee  
 under Rule 4(e), (f), or (g)." Fed. R. Civ. P. 4(i)(3).

26 <sup>3</sup> "To serve the United States, a party must: (A)(i) deliver a copy of the summons  
 27 and of the complaint to the United States attorney for the district where the action is  
 28 brought—or to an assistant United States attorney or clerical employee whom the United  
 States attorney designates in a writing filed with the court clerk—or (ii) send a copy of  
 each by registered or certified mail to the civil-process clerk at the United States  
 attorney's office; [and] (B) send a copy of each by registered or certified mail to the  
 Attorney General of the United States at Washington, D.C." Fed. R. Civ. P. 4(i)(1).